

No. 11995

United States
Circuit Court of Appeals
for the Ninth Circuit

MARGIE LEE WALLAN, as Administratrix of the Estate of
LANIER SARLES WALLAN, Deceased, for and on be-
half of the surviving widow, MARGIE LEE WALLAN,
and the surviving daughters, BARBARA LEE WALLAN
and SUSAN JEANNETTE WALLAN,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, co-part-
ners, doing business under the assumed name and style of
RANKIN AERONAUTICAL ACADEMY, and JOHN
GILBERT RANKIN and R. S. NORSWING, co-partners,
d.b.a. RANKIN AVIATION INDUSTRY; R. S. NOR-
SWING, individually, and SHIRLEY LORRAINE RAN-
KIN, as Executrix of the Estate of JOHN GILBERT
RANKIN, Deceased,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Northern Division

FILED
AUG 20 1948

PAUL P. O'BRIEN,

No 1191

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No. 11995

United States
Circuit Court of Appeals
for the Ninth Circuit

MARGIE LEE WALLAN, as Administratrix of the Estate of LANIER SARLES WALLAN, Deceased, for and on behalf of the surviving widow, MARGIE LEE WALLAN, and the surviving daughters, BARBARA LEE WALLAN and SUSAN JEANNETTE WALLAN,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY, and JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, d.b.a. RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix of the Estate of JOHN GILBERT RANKIN, Deceased,

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for the Southern District of California,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

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Los Angeles 14, Calif.

McCARTHY, DICKSON & SWINDELLS,
700 Yeon Bldg.,
Portland 4, Oregon.

JOHN B. EBINGER,
U. S. National Bank Bldg.,
Klamath Falls, Oregon.

For Appellees:

O'CONNOR & O'CONNOR,
530 West Sixth St.,
Los Angeles 14, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for
the Southern District of California, Northern
Division

No. 706-ND

MARGIE LEE WALLAN as Administratrix of
the estate of Lanier Sarles Wallan, deceased,
for and on behalf of the surviving widow,
MARGIE LEE WALLAN, and the surviving
daughters, BARBARA LEE WALLAN and
SUSAN JEANNETTE WALLAN,
Plaintiffs,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of Rankin Aeronau-
tical Academy, and JOHN GILBERT RAN-
KIN and R. S. NORSWING, co-partners, do-
ing business under the assumed name and style
of Rankin Aviation Industry; R. S. NOR-
SWING, individually, and SHIRLEY LOR-
RAINE RANKIN as Executrix of the estate of
John Gilbert Rankin, deceased.

Defendants.

CIVIL COMPLAINT

Plaintiffs for cause of action against the defend-
ants and each of them, alleges:

I.

That Margie Lee Wallan, the plaintiff herein, is
the duly appointed, qualified and acting adminis-

tratrix of the estate of Lanier Sarles Wallan, deceased, by virtue of an appointment duly made by the Circuit Court of the State of Oregon for Klamath County, and that such executor and the widow and the dependant daughters of plaintiff's decedent, at all times herein mentioned, were and are now bona fide residents, inhabitants and citizens of the State of Oregon, and non-citizens of the State of California; that Shirley Lorraine Rankin is the duly appointed, qualified and acting executrix of the estate of John Gilbert Rankin, deceased, by virtue of an appointment duly made by the Superior Court of the State of California for Tulare County, and that said John Gilbert Rankin, at the time [2] of the accident herein complained of, and each and every one of the defendants above named, were then, and at all times herein mentioned, and now are residents, inhabitants and citizens of the State of California, and that there is a diversity of citizenship existing betwen the plaintiffs and defendants herein.

II.

That more than the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs, is involved in this action.

III.

That at all times herein mentioned, the defendants, Rankin and Norswing, co-partners, doing business as Rankin Aviation Industry and/or Rankin Aeronautical Academy, were the owners and operators of a certain Republic Amphibian Seabee

Aircraft, Department of Commerce No. NC 6096K. and that the partner John Gilbert Rankin, in furtherance of the activities of said partnership, was the pilot thereof.

IV.

That on or about the 23rd day of February, 1947, at about the hour of 2:50 o'clock in the afternoon of said day, said John Gilbert Rankin, operating said Seabee Airplane, took off from the Klamath Falls Airport at Klamath Falls, Klamath County, Oregon, with the plaintiff's decedent, Lanier Sarles Wallan, as one of the passengers in said airplane; that said take-off executed by the said Rankin, as pilot, and the subsequent flight was done in a careless, negligent and reckless manner, in that, at the time and place of said take-off and flight, and under the conditions of the altitude of the airport, the temperature, density and pressure of the air then existing, the defendants caused said airplane to be overloaded, and maneuvered the same in such manner as to cause said airplane to be flown into and against some high-powered electric wires, or other obstructions, causing the same to [3] crash into the ground, causing the demise of plaintiff's decedent.

V.

That the defendants were careless, reckless and negligent in the operation of said aircraft in the following particulars, to wit:

a. In attempting to take off and fly said airplane when the same was overloaded;

b. In failing to keep a proper, or any, lookout for obstructions in the path of the flight of said airplane, and to so maneuver said airplane as to avoid colliding with such obstructions;

c. In failing to keep said airplane under proper control;

d. By failing to cause said airplane to gain sufficient forward speed to permit the climbing of same;

e. By attempting to fly said airplane in a "nose high" attitude, and at a critical angle of attack, thereby causing the same to mush and become incapable of climbing above the objects on the terrain in the path of said flight;

f. By taking off said airplane and attempting to fly same at or near the stalling speed;

g. That at all times and dates herein mentioned, there was in full force and effect, Civil Air Regulations of the Department of Commerce, Bureau of Aeronautics of the Government of the United States of America *inter alia* as follows, to wit:

"§ 43.1010. Aircraft Operation Record. An aircraft for which an air worthiness certificate is currently in effect, shall not be operated unless there is attached to such air worthiness certificate, an appropriate aircraft operation record, prescribed and issued by the Administrator, nor shall such aircraft be operated other than in accordance with the limitations prescribed [4] and set forth by the Administrator in such record. . . ."

That there was currently in effect for said Seabee aircraft, an air worthiness certificate and an aircraft operation record, prescribed and issued by the Administrator, which provided, inter alia, that said Seabee airplane was certificated under said Civil Air Regulations to be operated at a gross weight of not to exceed 3150 pounds. That at the time and place of said take-off and accident said aircraft was loaded and being operated by the defendants at a gross weight in excess of 3150 pounds, to wit: more than 3489 pounds.

VI.

That the acts of carelessness, recklessness and negligence as hereinbefore alleged, and each thereof, were the proximate cause of the accident herein complained of, and of plaintiff's decedent's death.

VII.

As a result of said accident, as aforesaid, the plaintiff's decedent, the said Lanier Sarles Wallan, received injuries from which he died;

VIII.

That at the time of his death, the said decedent left surviving him a widow, Margie Lee Wallan, and two dependent daughters, Barbara Lee Wallan and Susan Jeannette Wallan; that the plaintiff in this action as administratrix and personal representative prosecutes this action for the benefit of said Margie Lee Wallan and Barbara Lee Wallan and Susan Jeannette Wallan, as the surviving widow and daughters, respectively, of decedent; by virtue of and pursuant to Section 8-903 Oregon Compiled Laws Annotated, as amended.

IX.

That at the time of his death, the said Lanier Sarles Wallan was 39 years of age, and an intelligent, industrious and dutiful husband and father, with a life expectancy of approximately [5] 30.08 years.

X.

That at the time of said accident, the decedent left surviving him, his widow, Margie Lee Wallan of the age of 32 years, with a life expectancy of approximately 36 years; and his dependent daughter, Barbara Lee Wallan of the age of 10 years, with a life expectancy of 55 years; and his dependent daughter Susan Jeannette Wallan of the age of 8 years, with a life expectancy of approximately 57 years.

XI.

That prior to his death, the said Lanier Sarles Wallan was capable of earning and, in fact, did have, an income of more than Five Hundred (\$500.00) Dollars per month, out of which he supported his said widow and children.

XII.

That by reason of the wrongful death of said Lanier Sarles Wallan, occasioned by the negligence of the defendants as aforesaid, the estate of the said Lanier Sarles Wallan sustained a pecuniary loss and damage to its property as hereinafter alleged, and the said Margie Lee Wallan, his widow, and the said Barbara Lee Wallan and Susan Jeannette Wallan, his dependent daughters, have been

deprived of the care, aid and services of the said Lanier Sarles Wallan, all to their general damage in a sum greater than Ten Thousand (\$10,000.00) Dollars:

XIII.

That by reason of said wrongful death, the plaintiff was obliged to incur and pay funeral and burial expenses for the decedent to her special damages in the sum of \$745.00.

Wherefore, plaintiff demands judgment against the defendants, and each of them, for the sum of Ten Thousand (\$10,000.00) Dollars general damages, and for the further sum of \$745.00 special damages, and for her costs and disbursements herein [6] incurred.

/s/ JOHN B. EBINGER,

/s/ CHESTER E. McCARTY,

Attorneys for Plaintiff.

State of Oregon,

County of Klamath—ss.

I, Margie Lee Wallan, being first duly sworn, depose and say that I am the plaintiff in the within entitled cause, and the foregoing Civil Complaint is true as I verily believe.

/s/ MARGIE LEE WALLAN.

Subscribed and sworn to before me this 16th day of February, 1948.

(Seal) /s/ PEARL DUNLAP,

Notary Public for Oregon.

My commission expires September 9, 1949.

[Endorsed]: Filed Feb. 18, 1948. [7]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS
COMPLAINT

To Gerald Bridges, Esq., 216 West Sixth Street, Los Angeles, California; McCarty, Dickson & Swindells, 700 Yeon Building, Portland, Oregon; John E. Ebinger, U. S. National Bank Building, Klamath Falls, Oregon, Attorneys for the Plaintiff:

Please Take Notice that on Monday, the 5th day of April, 1948, at 10 a.m. of said day, or as soon thereafter as counsel can be heard, at the Courtroom of the Honorable Peirson M. Hall, Judge of the above-entitled Court, in Courtroom No. 3, Federal Building, City of Los Angeles, State of California, the above-named defendants and each of them will move the Court as follows: [8]

I.

To dismiss the complaint on the ground that the plaintiff has failed to state a claim against the defendants upon which relief may be granted.

II.

To dismiss the complaint on the ground that the plaintiff lacks capacity to sue.

III.

To dismiss the complaint on the ground that the defendants and each of them lack capacity to be sued.

IV.

To dismiss the complaint on the ground of lack of jurisdiction over the subject matter.

This motion will be based upon this notice of motion, the complaint on file herein and the memorandum of points and authorities attached hereto.

Wherefore, the defendants and each of them pray that the complaint be hence dismissed.

Dated this 18th day of March, 1948.

O'CONNOR & O'CONNOR,

By /s/ WILLIAM V. O'CONNOR.

[Affidavit of service by mail attached.]

[Endorsed]: Filed March 22, 1948. [9]

In the District Court of the United States for
the Southern District of California, Northern
Division

No. 706-N.D.

MARGIE LEE WALLAN as Administratrix of
the estate of Lanier Sarles Wallan, deceased,
for and on behalf of the surviving widow,
MARGIE LEE WALLAN and the surviving
daughters, BARBARA LEE WALLAN and
SUSAN JEANNETTE WALLAN,
Plaintiffs,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of Rankin Aeronau-
tical Academy, and JOHN GILBERT RAN-
KIN and R. S. NORSWING, co-partners, do-
ing business under the assumed name and style
of Rankin Aviation Industry; R. S. NOR-
SWING, individually, and SHIRLEY LOR-
RAINE RANKIN as Executrix of the estate
of John Gilbert Rankin, deceased,
Defendants.

JUDGMENT

In this action the defendants, John Gilbert Ran-
kin and R. S. Norswing, co-partners, doing business

under the assumed name and style of Rankin Aeronautical Academy, and John Gilbert Rankin and R. S. Norswing, co-partners, doing business under the assumed name and style of Rankin Aviation Industry; R. S. Norswing, individually, and Shirley Lorraine Rankin as executrix of the estate of John Gilbert Rankin, deceased, by their attorneys, O'Connor & O'Connor, by William V. O'Connor, Esquire, 530 West Sixth Street, Los Angeles, California, having appeared and filed a motion to dismiss the plaintiffs' [11] amended complaint herein, and the issue of law thereto arising having been duly submitted to the Court by the defendants, and having come on to be heard before this Honorable Court, and the Court, being fully advised in the premises, good cause appearing therefor, did, heretofore, to wit, on the 24th day of May, 1948, order that the said motion of the defendants to dismiss the said amended complaint in the above-entitled case be granted;

Now, Therefore, It Is Ordered, Adjudged and Decreed that judgment be entered in favor of the defendants and each of them, and that the plaintiffs take nothing by this action, and that said de-

endants and each of them have and recover their costs herein.

Dated this 3rd day of June, 1948.

/s/ PEIRSON M. HALL,
United States District Judge.

Approved as to form, pursuant to Rule 7 of the Local Rules, So. Dist. of California, this 3rd day of June, 1948.

/s/ GERALD BRIDGES,
Attorney for Plaintiffs.

Judgment entered June 3, 1948. Docketed June 3, 1948. Book 4, Page 352. Edmund L. Smith, Clerk, By [Illegible], Deputy.

[Endorsed]: Filed June 3, 1948. [12]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73(b)

Notice is hereby given that the plaintiff above named hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 3, 1948.

GERALD BRIDGES,
Of Attorneys for Appellant.

[Endorsed]: Filed June 22, 1948. [13]

[Title of District Court and Cause.]

STIPULATION DESIGNATING
RECORD ON APPEAL

The above named parties, through their respective counsel, do hereby stipulate and designate for inclusion in the Record on Appeal the following:

I.

Complaint for Damages for Wrongful Death filed February 18, 1948, as amended by interlineation pursuant to Order of Court on May 3, 1948.

II.

Notice of Motion to Dismiss Complaint filed March 22, 1948.

III.

Judgment filed June 3, 1948.

IV.

Notice of Appeal to Circuit Court of Appeals under Rule 73(b) filed June 22, 1948.

V.

This Stipulation designating contents of record on appeal.

Dated July 21, 1948.

GERALD BRIDGES,
CHESTER E. McCARTY,
JOHN B. EBINGER,

By /s/ GERALD BRIDGES,
Attorneys for Plaintiff and Appellant.

O'CONNOR & O'CONNOR,

By /s/ WILLIAM V. O'CONNOR,
Attorneys for Defendants and Respondents.

[Endorsed]: Filed July 24, 1948. [15]

In the District Court of the United States,
Southern District of California, Northern
Division

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 15, inclusive, contain full, true and correct copies of Complaint; Notice of Motion to Dismiss Complaint; Judgment; Notice of Appeal and Stipulation Designating Record on Appeal which constitute the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$4.40 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 26th day of July, A. D. 1948.

[Seal]

EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 11995. United States Circuit Court of Appeals for the Ninth Circuit. Margie Lee Wallan, as Administratrix of the Estate of Lanier Sarles Wallan, Deceased, for and on behalf of the surviving widow, Margie Lee Wallan, and the surviving daughters, Barbara Lee Wallan and Susan Jeannette Wallan, Appellant, vs. John Gilbert Rankin and R. S. Norswing, co-partners, doing business under the assumed name and style of Rankin Aeronautical Academy, and John Gilbert Rankin and R. S. Norswing, co-partners, d.b.a. Rankin Aviation Industry; R. S. Norswing, individually, and Shirley Lorraine Rankin, as Executrix of the Estate of John Gilbert Rankin, Deceased, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California. Northern Division.

Filed July 27, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11995

MARGIE LEE WALLAN as Administratrix of
the estate of Lanier Sarles Wallan, deceased,
for and on behalf of the surviving widow,
MARGIE LEE WALLAN, and the surviving
daughters, BARBARA LEE WALLAN and
SUSAN JEANNETTE WALLAN,

Plaintiff,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of Rankin Aeronau-
tical Academy, and JOHN GILBERT RAN-
KIN and R. S. NORSWING, co-partners, do-
ing business under the assumed name and style
of Rankin Aviation Industry; R. S. NOR-
SWING, individually, and SHIRLEY LOR-
RAINE RANKIN, as executrix of the estate of
JOHN GILBERT RANKIN, deceased.

Defendants.

APPELLANT'S POINTS ON APPEAL AND
DESIGNATION OF RECORD
POINTS RELIED ON BY APPELLANT

I.

The law of the State of Oregon provides a sub-
stantive right of action for damages resulting from
wrongful death which survives the deceased and
also survives the death of the wrongdoer and an

action for damages resulting from such wrongful death may be maintained by the personal representative of the deceased against the personal representative of the deceased wrongdoer.

II.

The law of the place of wrong governs rights of action arising from wrongful death.

III.

The law of the place of wrong determines whether an action for damages resulting from wrongful death survives the deceased.

IV.

The law of the place of wrong determines whether an action for damages resulting from wrongful death survives the death of the wrongdoer.

V.

An action for damages resulting from wrongful death may be maintained in the District Court, having jurisdiction, in any State, on a right of action arising in another State where the wrong took place, if by the law of the State where the wrong took place such right exists.

VI.

An action for damages resulting from wrongful death may be maintained in the District Court, having jurisdiction, in any State, on a right of action arising in another State where the wrong took place, against the personal representative of the deceased wrongdoer in the State of the forum, if by the law of the State where the wrong took

place such right exists against the personal representative of the deceased wrongdoer.

VII.

The law of the State of Oregon provides that an action for damages resulting from wrongful death must be brought by the personal representative (executor or administrator) of the deceased for the benefit of the surviving spouse and dependents of the deceased.

VIII.

If the law of the State where the wrongful death took place designates a particular representative to sue, such representative may bring such action in the District Court, having jurisdiction, in any State, as the owner of a claim in trust for certain distributees.

IX.

The law of the State of Oregon provides that the measure of damages in an action resulting from the wrongful death of a person, is the pecuniary loss suffered by the estate of the deceased.

X.

The law of the State of California provides that the personal representative of any person may maintain an action against the executor or administrator of a deceased wrongdoer who in his lifetime has wasted or destroyed the estate of such person by his wrongful death.

XI.

The pecuniary loss suffered by the estate of a deceased by reason of the wrongful death of such

deceased is a waste and destruction of the estate of such deceased by the wrongdoer within the purview of Section 574 of the Probate Code of the State of California.

XII.

A cause of action based on tort is not such a claim under the law of the State of California as must be presented to and rejected by the executor or administrator of the deceased wrongdoer as a condition precedent to and filing of an action thereon.

XIII.

When a cause of action for tort exists against co-partners, the liability of the partners is joint and several and the death of the partner who committed the tortious act does not relieve the surviving partner of liability nor abate an action against him based thereon.

DESIGNATION OF RECORD

Appellant designates the entire record as certified to by the Clerk of the District Court.

GERALD BRIDGES,
McCARTY, DICKSON &
SWINDELLS,

JOHN B. EBINGER,

By /s/ JOHN B. EBINGER,

Attorneys for Appellant.

[Verified.]

[Endorsed]: Filed Aug. 3, 1948. Paul P. O'Brien,
Clerk.